Supreme Court, U.S.
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No. 87-264

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

SOLIS, et al.,
Petitioners,

VS.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

SAN FRANCISCO BAY AREA
RAPID TRANSIT DISTRICT
OFFICE OF THE GENERAL COUNSEL
SHERWOOD WAKEMAN
General Counsel
JAMES W. ROSENQUIST
Attorney
800 Madison Street
Post Office Box 12688
Oakland, CA 94604-2688
(415) 464-6030

Attorneys for Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED FOR REVIEW

Respondent believes that the following is the issue presented for possible review:

Does the right of freedom of association prevent a local government transit district from temporarily shutting down its transit system and excluding union members from their employment where, during a "guerilla warfare" strike, the transit system's management has concluded that adequate service cannot be provided, that the safety of passengers is at risk and that those conditions were the result of concerted union activity occurring during a labor dispute?

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The respondent, San Francisco Bay Area Rapid Transit District, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the California Court of Appeal's unpublished opinion in this case.

STATEMENT OF THE CASE

Respondent incorporates by reference the facts of the case in the Court of Appeal's opinion as necessary.

In addition, respondent adds the following.

This case arises out of a 1979 labor dispute between respondent, San Francisco Bay Area Rapid Transit District (BART), and two unions, UPE 390 and ATU 1555, which represented the members of the plaintiff class. This dispute led to the ultimate shut down of BART's transit system.

The climate of that labor dispute is well-expressed in the following statement:

> "We still think that a strike is inevitable. It's just a question of when, and we want to reserve the right to determine when that strike will occur. We are engaged, if anybody didn't know it by now, in a guerilla warfare activity against BART. In effect, we've been on strike for two months. [7½ second audio blank; video shows Varacalli speaking] . . . for two months. It is a guerilla warfare type of strike. It is unfortunate. It's making a mess of the transit system. Uh, BART has been, uh, rather overreactive, if I can say that, to what we do." (Def. Ex.K.)

The speaker was Paul Varacalli, the principal representative of UPE 390. (RT 10/25: 153.) The place was a press conference at the union's headquarters. The date was August 29, 1979. (RT 10/25: 217.) Mr. Danzy, President of ATU 1555 attended, as did Mr. Maher, Chairman of UPE 390. (RT 10/21: 606-7.)

The BART system was shut down less than 48 hours later.

In 1976 BART and the two unions had entered into three year contracts, which expired on June 30, 1979. At that time one of the major remaining issues involved the cost-of-living allowance ("COLA"). It was significant because one of BART's negotiating objectives was to reduce (not eliminate) the rate of growth of its employees' wages and thereby, over time, bring wages back into line with the wages paid by other employers in the area. (RT 10/26: 362.) Extensive salary surveys (Def. Ex. Q) revealed that almost every category of BART worker was paid more than comparable workers in the San Francisco Bay Area.

As negotiations proceeded, BART experienced a maintenance slowdown, which manifested itself in a reduction of train cars available for service. The precise methods of the maintenance work slowdown were not documented. However, UPE 390's Chairman, Mr. Maher, admitted that his members had been instructed to go by the book, i.e. to consult maintenance manuals prior to doing work. (RT 10/21: 593.) Repetitive work was now checked in the manual. (RT 10/25: 241.)

When the contracts expired, union members stayed on the job, the sides continued to bargain, and the contracts remained in effect on a day-to-day basis. However, the "car-count" of available train cars continued to decline.

In this context, BART made its "final" offer on July 8, 1979, which was rejected by the unions three days later, July 11, 1979. On that date the transit-riding public was again a casualty of the guerilla war when BART's trains stopped running entirely for twenty minutes while certain members of UPE 390 left their posts to attend the union meeting. (RT 10/19: 297; 10/25: 259.) The upshot of the meeting was not only a rejection of BART's final offer but also a threat to strike. (Pl.Ex. 27.)

As a result of a continued deterioration of the car-count, in early July, BART modified its position on continuing the expired contracts in effect, and certain provisions of these contracts were modified. Thus, on July 19, 1979, BART agreed only to be "guided by" the old agreements and specified that grievance procedures in the expired contracts were not in effect. (Def. Ex. H.)

There was some improvement in the car count beginning about July 18, 1979, and for several days it appeared that the situation had stabilized. However, although daily maintenance production had returned to normal, something more than routine work-effort was required to eliminate the backlog of cars needing maintenance. As a result of this backlog, and the unwillingness of the union workers to address it successfully, BART decided on July 27, 1979, to temporarily reassign certain maintenance workers from its Concord repair shop. Those reassigned workers were to be sent to two other maintenance shops to augment the forces working there. The Concord shop would be staffed by non-union supervisory personnel. (RT 10/17:53; Pl.Ex. 8.)

The insurgents' response to this was to take over BART's Concord shop on the night of July 28/29. BART's supervisory personnel were forceably evicted. (RT 10/25: 230-240.)

Ironically, after taking over the premises of the Concord shop, UPE 390's lawyers went to court to seek a writ of mandate, filing an action in the Contra Costa County Superior Court. (Def.Ex.

F.) On August 3, 1979, the Contra Costa County Superior Court issued an order which, in part, required the union members to cease their occupation at Concord and prohibited BART from transferring the union members out of Concord as planned on July 27, 1979. (Pl.Ex. 20.) BART appealed and was ultimately vindicated, when the Court of Appeal overruled the Superior Court and confirmed that BART had the right, while no contract was in force, to deal with its workforce. *San Francisco Bay Area Rapid Transit District v. Superior Court*, 97 Cal.App.3d 153, 158 Cal.Rptr 627 (1979).

Although BART once again controlled the premises of its Concord shop after the order, there was continued unrest and the car count did not improve. Although the previous hostile forays had principally involved the members of UPE 390, the other union, ATU 1555, through its president, had been involved in the Concord shop sit-in. On August 11, ATU 1555 went on record with a threat of selective strikes. (Pl.Ex. 18.)

BART continued to try to resolve the impass between the parties. On August 14, 1979, it presented to the unions two variations on the so-called final offer. (Exhibit V.) There were additional formal negotiations (Def.Ex. R), as well as behind the scenes informal discussions. (RT 10/17: 58.)

With a collective bargaining agreement in a state of limbo, BART wanted its employees to know the rules which were applicable to their employment. (RT 10/17: 70.) Thus, on August 20, 1979, BART issued the so-called Interim Terms and Conditions of Employment (Exhibit 13.) These conditions varied from the expired collective bargaining agreements, and the modifications were designed to discourage selective strikes as well as to increase maintenance production through overtime and thereby improve the car-count problem. (RT 10/17: 72-4.) The interim terms were issued unilaterally by BART, and, of course, the unions could never agree to them. For example, Mr. Maher testified that his union never followed the complaint procedures set forth in the Interim Terms and Conditions. (RT 10/21: 599.)

Negotiations, however, continued. A group of union leaders was brought in to provide assistance. (RT 10/17: 68.) A joint

union bulletin indicated that, as of August 27, 1979, a strike was imminent, and members of the unions were instructed to refuse to work overtime. (Pl.Ex.31.)

There were also incidents of sabotage. (RT 10/20: 469-73). BART knew at all times, and during trial acknowledged, that the vast number of its employees were blameless in the insurgency being waged against BART and the transit-riding public. Certainly BART has never contended that any more than a handful of its employees were responsible for the deliberate destruction of property which occurred between August 27 and 29, 1979, when eighty airbag suspension systems, on thirty-four train cars were slashed at Concord. (Def.Ex. 32.)

The airbag slashing incident resulted in an immediate suspension of the union workers at Concord. (RT 10/20: 464.) At the same time, BART started to demand overtime work from its maintenance workers, since the car-count still remained low and productivity had not increased. The workers' refusals to work overtime resulted in disciplinary suspensions. The suspensions ordered by BART management were planned out and scheduled in a way to attempt to avoid additional disruption to maintenance efforts. (RT 10/17: 66; Pl.Ex. 15.) However, the suspensions at Concord made that facility useless for maintenance. Accordingly, BART management planned to install supervisors to inspect and then repair the trains at Concord. (RT 10/17: 88-9.)

August 31, 1979 was ATU 1555's day to carry the burden of disruption. Train operators refused to work, but utilized the subterfuge of "dropping-sick." Supervisors' reports show the numbers were in excess of thirty-five. (Def.Exs. M and N.) "BART flu" was the culprit, and a union memo of that day (Pl.Ex. 22) makes it crystal clear that the union was spreading the disease.

The BART system was shut down on the evening of August 31, 1979. Mr. Bernard, BART's General Manager, made the decision. Several reasons led to his conclusion. First, because of train operators dropping sick in Concord, BART could not run enough trains to provide an adequate service. (RT 10/27: 317-9.) Safety was a second concern, given overcrowding of trains and incidents

of sabotage or tampering which had been reported to him. (RT 10/27: 319-20.) Also, Mr. Bernard was convinced that the events of August 31, 1979 were a further demonstration of the concerted action being waged against BART.

The next day, September 1, 1979, Mr. Demko, BART's maintenance manager, impounded the fleet of transit vehicles. This was done so that every car could be checked and a determination be made as to the integrity of the equipment. (RT 10/20: 475.)

Although the unions claimed that their members were ready to go back to work, the unions' proposal of September 7, 1979, was to return to work provided that the old contracts were put back in to force. This was rejected. Later, after the status of the transit vehicle fleet had been stabilized, BART offered the unions the opportunity to bring their members back to work with the return of individual workers to be phased-in as the operation of the system was begun. ATU 1555 rejected this offer, (Def.Ex. Y.) but the record is silent with respect to any response from UPE 390.

An agreement was finally reached on new collective bargaining agreements shortly before the Thanksgiving holiday, and the union employees returned to work on November 23, 1979.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decision Below Gave Full Consideration To The Issues And Decided Them Correctly

The California Court of Appeal, in affirming the trial court's opinion, applied the correct standard of review in this case. The Court relied on *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731 (1968) and its progeny, *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), reaffirmed in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 99 S.Ct. 693 (1979), and found that respondent did not offend petitioners' First Amendment rights by temporarily shutting down its transit system and not allowing Petitioners to work for approximately three months. (Court of Appeal Decision, Section I, A-5-A-6.)

In determining public employees' rights under the First Amendment a balance must be struck between the interests of the employees in their expressive activity and the interest of the employer in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734 (1969).

There is no doubt the Court of Appeal, in reviewing the facts of this case, struck the correct balance in favor of respondent employer. The court detailed the circumstances which led to the decision to shut down the transit system: the slow-down in car maintenance, the take-over and occupation of the Concord shop for five days by employees; the damage to tools and vehicles, the proclamation by a union representative that a "guerilla war" was being waged; and employees "dropping sick". (Court of Appeal Decision, Facts and Procedural History A1-A4.) The Court of Appeal found that:

> "Membership in the two unions had indeed come to threaten the efficient operation of BART on August 31. ATU 1555 prepared a bulletin dated August 31 which threatened that any member who replaced a member who had dropped sick would be subject to union charges. A similar call for "discipline" in the face of management calls for overtime was made on behalf of both unions on August 27. After the president of ATU 1555 was told on August 31 at about 5:15 p.m. that there would be a management press conference, station agents throughout downtown San Francico dropped sick. In order to retain their jobs the employees had to belong to the union. Yet the union was now threatening discipline if the employees complied with management requests for overtime or reassignment. Under the Interim Terms and Conditions of Employment adopted unilaterally by BART on August 20, acceptance of overtime was mandatory. Members of these unions were in the untenable situation of being subject to union discipline if they did work and employer discipline if they did not. Their union membership imposed demands upon them which, directly affected the efficient operation of the transit system." (Court of Appeal Decision, Section I, A-6.)

The Court of Appeal rejected the notion that the decision to temporarily refuse to allow the employees to work was motivated by anti-union animus. (Court of Appeal Decision, Section I, A-7.) The Court in striking the correct balance held:

> "[O]n the facts of this case where such a situation pertained, *and* where there was a serious threat to the continued safe operation of a mass transit system whose thousands of passengers might otherwise be stranded or endangered while traveling through the Transbay tube or the East Bay Tunnel or on some elevated portion of the system, that the potential hazards to the public outweighed the injury suffered by the members of the unions for the period of the lock-out."(Emphasis in original.) (Court of Appeal Decision, Section I, A-8.)

The Court of Appeal decision is consistent with another progeny of *Pickering* decided by this Court. In *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684 (1983), this Court held that the *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. *Id.* at 151, 103 S.Ct. at 1692.

> "To this end, the Govenment, as an employer must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." (*Id.*, citing *Arnett v. Kennedy,* 416 U.S. 134, 168, 94 S.Ct. 1633, 1651 (1974).

The Court of Appeal correctly concluded that First Amendment rights were not violated under the facts of this case and the opinion presents no conflict with decisions of this Court.

2. A Review By This Court Would Involve Only Questions Of Fact

The questions petitioners raise in their Petition turn on the particular facts of this case alone and are of interest only to the parties to it.

Petitioners take the position that the Court of Appeal applied an incorrect framework of analysis in determining petitioners' First Amendment rights and argue that the Court should have based its analysis on *United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419 (1967), and similar cases, prohibiting "guilt by association." (Petition, page 19.) Petitioners' position is entirely premised on an incorrect interpretation of the trial record. That faulty premise reduces this case simply to one in which the employer is characterized as refusing to allow employees to work *solely* because of their union membership. This incorrect view was rejected by both the trial court and the Court of Appeal.

In effect, petitioners ask this Court to make a third review of the lengthy trial record and find what two lower courts were unable to find—a claim for relief based on the First Amendment to the United States Constitution under 42 U.S.C. Section 1983. This Court should deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts of a case already resolved twice in favor of respondent. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

Further, since this is essentially a factual case, a further review shall have no impact outside the limits of this case. Assuming for purposes of argument that an interesting or even novel principle of law might evolve from a review, it would be limited to the peculiar facts of this case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 9, 1987

Respectfully submitted,

SAN FRANCISCO BAY AREA
RAPID TRANSIT DISTRICT
OFFICE OF THE GENERAL
COUNSEL

By JAMES W. ROSENQUIST
Attorney For Respondent